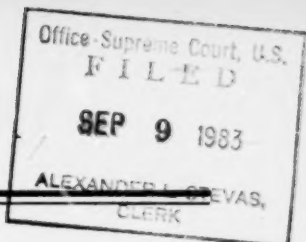


83 - 431

No.



IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

JEFFREY B. BATTLE, KAREN BATTLE, d/b/a
BAYVIEW SERVICE AND SUPPLY Co., and
ANCHOR SUPPLY Co., Inc.,
Petitioners,

GORDON WATSON and THOMAS WATSON

v.

THE LUBRIZOL CORPORATION, JENKIN-GUERIN,
Inc. and JACK K. KRAUSE,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Eighth Circuit

PAUL H. SCHRAMM, Esq.
(Counsel of Record)
M. HARVEY PINES, Esq.
MARK S. CORMAN, Esq.
SCHRAMM, PINES & SPEWAK
120 South Central, Suite 1404
St. Louis (Clayton)
Missouri 63105
(314) 721-5321
Attorneys for Petitioners

QUESTIONS PRESENTED

1. Whether a *per se* unlawful vertical price-fixing conspiracy under Section 1 of the Sherman Act, 15 U.S.C. §1, can be inferred from evidence that a manufacturer received price complaints from a distributor's competitor, that the manufacturer understood the competitor to be requesting and hoping that the manufacturer would discontinue selling to the distributor, and that in reliance on the information supplied by the competitor and not as a result of an independent investigation the distributor was terminated by the manufacturer.

This issue presents a direct conflict in the circuits.*

PARTIES TO THE PROCEEDINGS

Petitioners Jeffrey B. Battle and Karen Battle d/b/a Bayview Service and Supply Company and Anchor Supply Company, Incorporated, were appellants below on the issues presented for review. Respondents, The Lubrizol Corporation, Jenkin-Guerin, Incorporated, and Jack K. Krause were appellees below on the issues presented for review.

* *Schwimmer v. Sony Corp. of America*, 103 S.Ct. 362, 363 (1982) (White, J., citing *Battle v. Lubrizol Corp.*, 673 F.2d 984 [8th Cir. 1982], in dissenting from denial of certiorari).

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties To The Proceedings	i
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Statute Involved	2
Statement Of The Case	2
Reason For Granting The Writ:	
I. A <i>per se</i> unlawful vertical price-fixing conspiracy can be inferred from evidence that a manufacturer received price complaints from a distributor's competitor, that the manufacturer understood the competitor to be requesting and hoping that the manufacturer would discontinue selling to the distributor and that in reliance on the information supplied by the competitor and not as a result of an independent investigation the distributor was terminated by the manufacturer. . .	7
Conclusion	14
Certificate of Service	15

Appendix

App. A: Eighth Circuit <i>en banc</i> Opinion, <i>Battle v. Lubrizol Corp.</i> , No. 81-1585, July 12, 1983	A-1
App. B: Eighth Circuit <i>en banc</i> Opinion, <i>Roesch, Inc. v. Star Cooler Corp.</i> , No. 81-1562, July 12, 1983	A-8

App. C: Eighth Circuit Opinion (panel), <i>Battle v. Lubrizol Corp.</i> , No. 81-1585, March 4, 1982.....	A-14
App. D: District Court Order and Memorandum granting Lubrizol's motion for summary judgment, May 11, 1981	A-33

TABLE OF AUTHORITIES

	Page
Cases	
<i>Adickes v. S. H. Kress & Co.</i> , 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed. 2d 142, 154 (1970)	3,7
<i>Battle v. Lubrizol Corp.</i> , 673 F.2d 984 (8th Cir. 1981) ..	4,5,7
<i>Blair Foods, Inc. v. Ranchers Cotton Oil</i> , 610 F.2d 665 (9th Cir. 1980)	8
<i>Coleman Motor Co. v. Chrysler Corp.</i> , 525 F.2d 1338 (3rd Cir. 1975)	8
<i>Filco v. Amana Refrigeration, Inc.</i> , 1983-1 Trade Cases ¶ 65,450 at 70, 571 (9th Cir. 1983)	9,10,11,14
<i>Gainesville Utilities Dept. v. Florida Power & Light Co.</i> , 573 F.2d 292 (5th Cir. 1978), <i>cert. denied</i> , 439 U.S. 966, 99 S.Ct. 454, 58 L.Ed. 2d 424 (1978)	8
<i>Interstate Circuit, Inc. v. U.S.</i> , 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610 (1939)	8
<i>Pan-Islamic Trade Corp. v. Exxon Corp.</i> , 632 F.2d 539 (5th Cir. 1980), <i>cert. denied</i> , 454 U.S. 927 (1981)	8
<i>In Re Plywood Antitrust Litigation</i> , 655 F.2d 627 (5th Cir. 1981), <i>cert. granted</i> , 456 U.S. 971 (1982)	8

Rosebrough Monument Co. v. Memorial Park Cemetery, 666 F.2d 1130 (8th Cir. 1981), <i>cert.</i> <i>denied</i> , 457 U.S. 1111 (1982)	8
Roesch, Inc. v. Star Cooler Corp., No. 81-1562 (8th Cir., July 12, 1983)	5
Schwimmer v. Sony Corp. of America, 103 S.Ct. 362 (1982)	7,13
Spray-Rite Service Corp. v. Monsanto Co., 684 F.2d 1226 (7th Cir. 1982) <i>cert. granted</i> , 103 S.Ct. 1249 (1983)	9,10,12,14
U.S. v. Colgate, 250 U.S. 300 (1919)	13
Venture Technology, Inc. v. Natural Fuel Gas Co., 685 F.2d 41 (2d Cir. 1982), <i>cert. denied</i> , 103 S.Ct. 362 (1982)	8

Statutes

15 U.S.C. §1	passim
28 U.S.C. §1254(1)	2

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JEFFREY B. BATTLE, KAREN BATTLE, d/b/a
BAYVIEW SERVICE AND SUPPLY CO., and
ANCHOR SUPPLY CO., INC.,
Petitioners,

GORDON WATSON and THOMAS WATSON

v.

THE LUBRIZOL CORPORATION, JENKIN-GUERIN,
INC. and JACK K. KRAUSE,
Respondents.

**PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Eighth Circuit**

Petitioners, Jeffrey B. Battle and Karen Battle d/b/a Bayview Service and Supply Co. and Anchor Supply Co., Inc., respectfully request that a writ of certiorari issue to review the judgment and decision of the Court of Appeals for the Eighth Circuit entered on July 12, 1983.

OPINIONS BELOW

The as yet unreported opinion of the Court of Appeals *en banc* appears as App. A in the Appendix. The panel opinion of the Court of Appeals is reported at 673 F.2d 984 and appears as

App. C in the Appendix. The District Court's ruling granting Lubrizol's motion for summary judgment is reported at 513 F.Supp. 995 and appears as App. D in the Appendix.

JURISDICTION

The judgment of the Court of Appeals, *en banc* (App. A), was entered on July 12, 1983. Jurisdiction of this Court is premised upon 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal

STATEMENT OF THE CASE

A. Introduction

Petitioner seeks review of the Eighth Circuit's *en banc* decision that the evidence before the District Court, when construed in the light most favorable to the petitioners and with all reasonable inferences drawn in favor of the petitioners without assessing the credibility of witnesses, compels the conclusion that petitioners failed as a matter of law to establish an element of their Sherman Act § 1 claim, to-wit: that Lubrizol terminated Battle as a direct purchaser of Lubrizol 2085A pursuant to concerted action between it and Jenkin-Guerin.

B. Material Facts.

With regard to the issue of concerted action which is the only issue before this Court the evidence is to be construed most

favorably to petitioners and with all reasonable inferences drawn in their favor.¹

As found by the panel of the Court of Appeals these facts are as follows:

Lubrizol manufactures and sells Lubrizol 2085A, a rustproofing compound. Jenkin-Guerin is a wholesale distributor of chemical compounds, one of which is Lubrizol 2085A. Jenkin-Guerin packages and sells Lubrizol 2085A under the trademark "Anchor Tuflex." For a period of several months in late 1978 and 1979, Anchor Supply Co., controlled by Battle, purchased Lubrizol 2085A from Jenkin-Guerin and unsuccessfully attempted to compete for a share of the automobile rustproofing market. In July of 1979, appellants [petitioners] approached Lubrizol with a proposal to distribute Lubrizol 2085A for marine vessel and industrial rustproofing uses as well as limited automotive uses. Because of the competitive pricing aspects of the marine market, appellants [petitioners] requested a direct supply from Lubrizol at a lower price than they could obtain from Jenkin-Guerin. Interested in expanding into the marine market, Lubrizol agreed to supply Lubrizol 2085A directly to Bayview Service & Supply Co., another company controlled by Battle.

Although appellants [petitioners] apparently made some unsuccessful attempts to enter the marine vessel rustproofing market during the next few months, between October and December of 1979, Anchor was actively marketing Lubrizol 2085A under the name "Armor Shield" for automotive uses and soliciting Jenkin-Guerin's customers with some success by undercutting Jenkin-Guerin's prices.

¹ See, e.g., *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L.Ed. 2d 142, 154 (1970).

Battle v. Lubrizol Corp., 673 F.2d 984, 986 (8th Cir. 1981) (App. C. at 2-3). The record further indicates the following:

(1) That in January of 1980, Jack Krause, president of Jenkin-Guerin, learned of petitioners' discounting practices and on January 21, 1980, placed a series of telephone calls to Irwin Ehren, Manager of Rustproofing Products for Lubrizol and George J. Arkedis, Director of Diversified Products for Lubrizol. (Memo of Def. Lubrizol in Support of Motion for Summary Judgment Statement of Material Facts ["Lubrizol Statement of Material Facts"] at ¶ 16);

(2) During the course of these conversations Krause related to Ehren and Arkedis that Battle was selling Lubrizol 2085A to Jenkin-Guerin customers at a price below Jenkin-Guerin's, that he was upset and confused about the situation and that he wanted to know whether Lubrizol would discontinue selling Lubrizol 2085A directly to Battle. (Lubrizol Statement of Material Facts at ¶ 16);

(3) As a result of their telephone conversations with Krause, Ehren and Arkedis understood Krause to hope that based upon the information he had relayed Lubrizol would terminate Battle as a direct purchaser of Lubrizol 2085A. (Lubrizol Statement of Material Facts at ¶ 16);

(4) Shortly after these conversations with Krause, Arkedis relying upon the information supplied by Krause, and not as a result of an independent investigation of that information recommended to William Bares, Vice-President of Lubrizol, that Battle be terminated as a direct purchaser of Lubrizol 2085A (Arkedis Depo. at 49-50);

(5) That in his conversations with Bares regarding his recommendation that Battle be terminated Arkedis related that Krause and Jenkin-Guerin had complained of and were concerned about Battle's price competition. (Bares Depo. at 14); and

(6) That Bares decided to terminate Battle as a direct purchaser of Lubrizol 2085A based upon the information supplied by Arkedis and not upon an independent investigation of the facts. (Bares Depo. at 17-18, 50). See, also, *Battle v. Lubrizol Corp.*, 673 F.2d at 986; App. C. at 3.

C. The Eighth Circuit's Decision.

An equally-divided Eighth Circuit *en banc* affirmed the judgment of the District Court granting Lubrizol's Motion for Summary Judgment. (App. A at 3). Four Justices (the "affirming Justices") held that the opinion of the Eighth Circuit *en banc* in *Roesch, Inc. v. Star Cooler Corp.*, No. 81-1562 (July 12, 1983) (App. B) controlled the result herein. Four Justices (the "dissenting Justices") dissented from this decision holding that for the reasons stated therein and in the panel opinion in *Battle, supra*, 673 F.2d 984 (App. C), the judgment of the District Court should be reversed. The affirming Justices construed the evidence as establishing that "a competing distributor (Jenkin-Guerin) complained to the manufacturer (Lubrizol) but received a neutral response; and later, the manufacturer made a unilateral decision to terminate plaintiffs (Battle)." (App. A at 3) (parentheses supplied). Under this view of the evidence these Justices held that this case fell within the well-established rule that a sequential relationship between competitor complaints and a discounting distributor's termination does not allow an inference of concerted action. (App. A at 4).

The dissenting Justices, however, viewed the evidence differently finding that, when construed in the light most favorable to petitioners, the evidence was sufficient to indicate that Lubrizol's decision to terminate Battle was not a unilateral decision on its part, but was *in response to Jenkin-Guerin's price-related complaints*. (App. A at 6) (emphasis supplied). Both the affirming and dissenting Justices held that responsive action by

Lubrizol to Jenkin-Guerin's price-related complaints would have been sufficient for a jury to have found an inference of concerted action under § 1 of the Sherman Act. (App. A at 3, 6). The justices diverged only on the question of whether the evidence was sufficient to allow an inference that Lubrizol's termination of Battle was in response to Jenkin-Guerin's price-related complaints.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit's *en banc* decision impliedly adopted the rule that a manufacturer's termination of a distributor in response to the price-related complaints of competing distribution is sufficient to allow an inference of concerted action under § 1 of the Sherman Act. In the same breath the decision rendered this rule meaningless by also adopting an unattainable standard of proof of responsive action by a manufacturer, one which would require a memorialized agreement between the co-conspirators and thus no resort to inference at all. This cause was decided on Lubrizol's motion for summary judgment and thus the evidence and all inferences drawable therefrom were to be resolved in favor of petitioners without assessing the credibility of the witnesses. *Adickes, supra*, 398 U.S. at 157. Presumably, the Eighth Circuit, *en banc* (equally divided), applied this principle and nevertheless held that the evidence did not establish that Lubrizol's termination of Battle was in response to Jenkin-Guerin's price-related complaints. This case, therefore, raises an important question under § 1 of the Sherman Act as to the quantum of evidence necessary to establish responsive action, thus justifying an inference of concerted action. As Justice White has pointed out,

“[b]ecause illegal conspiracies can rarely be proved through evidence of explicit agreement, but must usually be established through inferences from the conduct of the alleged conspirators, this disagreement in the circuits over the nature of proof required is especially significant.”

Schwimmer v. Sony Corp. of America, 103 S. Ct. 362, 363 (1982) (White, J., dissenting from denial of writs of certiorari).

Petitioners, like the dissenters in *Battle*, have no quarrel with the principle relied upon by the affirming Justices that a manufacturer's termination after receiving complaints cannot be characterized in and of itself as responsive action permitting an inference of concerted action. The facts, however, show that

more than a sequential relationship between Jenkin-Guerin's complaints and Lubrizol's termination of Battle was present herein. The facts plainly indicate that the Lubrizol personnel who made the decision to terminate Battle knew of Jenkin-Guerin's price-related complaints, understood that Jenkin-Guerin wished Lubrizol to cease dealing directly with Battle and did not independently investigate Jenkin-Guerin's complaints. Together these facts are sufficient so that a jury could make a finding that Battle was terminated by Lubrizol *in response* to Jenkin-Guerin's price-related complaints and thus permits an inference of concerted action to be drawn. The overwhelming weight of authority supports this conclusion.

It is beyond question that an express agreement between Lubrizol and Jenkin-Guerin need not be shown. The requisite concerted action to establish a violation of § 1 of the Sherman Act can be inferred from circumstantial evidence. See, e.g., *Venture Technology, Inc. v. Natural Fuel Gas Co.*, 685 F.2d 41, 45 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 362 (1982); *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 671 (9th Cir. 1980); *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 558 and n. 29 (5th Cir. 1980), *cert. denied*, 454 U.S. 927 (1981); *Rosebrough Monument Co. v. Memorial Park Cemetery*, 666 F.2d 1130, 1139-40 (8th Cir. 1981), *cert. denied*, 457 U.S. 1111 (1982); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1345 (3rd Cir. 1975). See also, *Interstate Circuit, Inc. v. U.S.*, 306 U.S. 208, 221-27, 59 S. Ct. 467, 472-74, 83 L.Ed. 610 (1939). Thus, "proof of a conspiracy under § 1 of the Sherman Act does not require the existence of an express agreement It is 'enough that, knowing that concerted action was contemplated and invited, the [defendants] gave their adherence to the scheme and participated in it.' " *In Re Plywood Antitrust Litigation*, 655 F.2d 627, 634 (5th Cir. 1981), *cert. granted*, 456 U.S. 971 (1982) (quoting from *Gainesville Utilities Dept. v. Florida Power & Light Co.*, 573 F.2d 292, 300 (5th Cir. 1978), *cert. denied*, 439 U.S. 966, 99 S. Ct. 454, 58 L.Ed. 2d 424 [1978]). As heretofore stated, the Eighth Circuit herein implied-

ly adopted the rule applied by the Seventh and Ninth Circuits that an inference of concerted action is allowed where the evidence supports a finding that a manufacturer terminated a distributor in response to the price-related complaints of the distributor's competitors. *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226, 1238-39 (7th Cir. 1982); *cert. granted*, 103 S. Ct. 1249 (1983); *Filco v. Amana Refrigeration, Inc.*, 1983-1 Trade Cases ¶ 65,450 at 70, 571 (9th Cir. 1983) (inference of concerted action is allowed where the evidence establishes a causal nexus between the competitors' complaints and the manufacturer's termination).

The question presented is what quantum of circumstantial evidence will allow a finding of responsive action by the manufacturer, *Spray-Rite, supra*, or the requisite causal nexus, *Filco, supra*. Specifically, did the facts adduced herein, when viewed in the light most favorable to petitioners satisfy this quantum of proof. The Ninth Circuit's decision in *Filco, supra*, 1983-1 Trade Cases ¶ 65,450 provides some guidance as to the quantum of proof necessary to establish a causal nexus between competitors' complaints and a manufacturer's termination of a distributor. In discussing this issue, the Ninth Circuit stated:

[C]ourts have looked at a variety of factors in assessing causation: the volume and intensity of complaints; the time gap between receipt of complaints and termination; and whether the manufacturer had a valid independent reason for terminating the discounting dealer.

Although none of these factors alone would be strong evidence of illegal concerted action, a combination of them could provide the necessary nexus between complaints and termination

Filco, supra, 1983-1 Trade Cases at 70, 572-70, 573 (citations omitted). The quantum of proof required to establish that a distributor's termination by a manufacturer was in response to the complaints of competing distributors was also discussed in

Spray-Rite, supra, 684 F.2d 1226. After citing to the principle that “proof of distributorship termination in response to competing distributors’ complaints about the terminated distributor’s pricing policies is sufficient to raise an inference of concerted action,” *id.* at 1239, the Seventh Circuit analyzed the facts in *Spray-Rite* and found that the following facts allowed an inference of concerted action:

Thomas Dille, a former Monsanto District Manager for Spray-Rite’s area of primary responsibility, testified that he received numerous complaints about Spray-Rite’s price-cutting practices. He further testified that some distributors requested that Monsanto terminate Spray-Rite’s supply of Monsanto herbicides. James Hopkins, president of Hopkins Agricultural Chemical Company, a Monsanto distributorship in competition with Spray-Rite, testified that he complained to Monsanto about Spray-Rite’s prices. Emmett McCormick, a former Monsanto Area Supervisor, testified that Monsanto was concerned about stabilizing the resale price of its herbicides and that Monsanto considered Spray-Rite a price-cutter. Yapp, president of Spray-Rite, testified that various Monsanto District Managers in 1966, 1967, and 1968 threatened to terminate his distributorship if he did not raise his prices. Finally, Monsanto did terminate Spray-Rite in 1968.

Spray-Rite, supra, 684 F.2d at 1239.

Petitioners submit that the facts herein, when viewed in the light most favorable to them, establish that this case fits squarely within the bounds of the quantum of proof set forth in *Filco, supra*, and *Spray-Rite, supra*, and that the Eighth Circuit *en banc* erred to the extent that it held petitioners’ evidence insufficient to establish responsive action. As heretofore set forth, the facts establish the following scenario culminating in Battle’s termination by Lubrizol as a direct purchaser of Lubrizol 2085A:

(1) The President of Jenkin-Guerin, a competitor of Battle, upon learning that Battle was marketing Lubrizol 2085A to Jenkin-Guerin customers at a price below Jenkin-Guerin telephoned representatives of Lubrizol complaining of Battle's price competition and wanting to know whether in light of his complaints Lubrizol would continue selling to Battle;

(2) Jenkin-Guerin was understood by the Lubrizol representatives to be hoping or requesting that on the basis of its complaints Battle be terminated, which understanding was relayed to all Lubrizol representatives involved in the decision to terminate Battle; and

(3) Lubrizol did not perform an independent investigation of Jenkin-Guerin's complaints.

Supra, at 4-5. These facts thus indicate that Lubrizol received price-related complaints from Jenkin-Guerin requesting that responsive action be taken, that the action requested by Jenkin-Guerin was in fact taken a short time after the request and that in taking this action Lubrizol did not independently investigate the facts surrounding the complaint and request for responsive action. Under the *Filco* scheme these facts more than suffice to allow an inference of concerted action. The volume and intensity of complaints over a short period of time is evident. Lubrizol's representatives have conceded in their deposition testimony that Jenkin-Guerin's complaints occurred frequently over a short period of time and that it was evident that Jenkin-Guerin was upset over the situation. *Supra*, at 4-5. Furthermore, only a short time elapsed between Jenkin-Guerin's complaints and Battle's termination by Lubrizol. Jenkin-Guerin's complaints were made on or about January 21, 1980, and Battle was terminated on February 27, 1980. Finally, Lubrizol's representatives conceded in their depositions that no independent investigation of Jenkin-Guerin's complaints was ever conducted. *Supra* at 5. This latter fact negates the presence of any

independent justification for Battle's termination, since no independent investigations which would have yielded such a justification was ever undertaken.² Thus the three factors deemed relevant by the Ninth Circuit in evaluating the presence of concerted action are satisfied herein and a finding of concerted action was clearly warranted.

Applying *Spray-Rite* to these facts leads to the same conclusion. In *Spray-Rite* the facts supported findings (1) that competitors' complained to Monsanto of *Spray-Rite's* discounting practices and requested that *Spray-Rite's* supply of Monsanto's products be cut off; and (2) that Monsanto had previously threatened to terminate *Spray-Rite* if it did not raise its prices. *Spray-Rite, supra*, 684 F.2d at 1239. The evidence herein also indicates that a competitor requested that Lubrizol terminate Battle's supply of Lubrizol 2085A. To be sure, petitioners have no evidence of prior threats by Lubrizol to terminate Battle based upon his discounting practices. The lack of such evidence strengthens petitioners' case, however, since its presence could have indicated some basis for a claim that Lubrizol unilaterally decided to terminate Battle and in doing so was merely carrying out a prior threat. Thus, under the standards adopted by the Seventh and Ninth Circuits the facts herein amply justify an inference of concerted action. The Eighth Circuit's failure to adhere to this standard creates a conflict among the circuits as would justify the granting of this Writ.

Respondents in reply may cast doubt upon the validity of the *Spray-Rite* decision since that case will be argued before this Court this coming term. Petitioners submit that the fact that a writ of *certiorari* was granted therein to decide the precise issue presented herein, the quantum of proof necessary to establish

² Even if Lubrizol were to proffer a theory and evidence of independent justification it would still be a question for a jury to decide whether it chose to believe such evidence.

concerted action under § 1 of the Sherman Act, certainly commands similar treatment for this case.

Finally, petitioners suggest that this Court consider the devastating effect which this aberrant decision will have on future Sherman Act claims if it is allowed to stand. With all due respect to those Justices of the Eighth Circuit who found the facts herein insufficient to allow an inference of concerted action, petitioners submit that such a holding emasculates § 1 of the Sherman Act. An essential element of all claims under § 1 of the Sherman Act is that there existed a contract, combination or conspiracy, *i.e.*, concerted action. 15 U.S.C. § 1. Thus the courts have consistently held that unilateral action does not violate § 1 of the Sherman Act. *E.g.*, *U.S. v. Colgate*, 250 U.S. 300, (1919). The quantum of proof necessary to establish this requisite finding of concerted action is, therefore, of great importance. *See, e.g.*, *Schwimmer v. Sony Corp. of America*, 103 S. Ct. 362, 363 (1982) (White, J., dissenting from denial of writs of certiorari). The Eighth Circuit's decision herein which holds that an inference of concerted action is not drawable from evidence that a competing distributor requested that a manufacturer terminate a discounting distributor, that the manufacturer understood that responsive action was requested, that the precise action requested by the competitor was in fact taken by the manufacturer and that no reasons independent of the competitor's complaints existed for the action leaves petitioners in a quandary. The only additional evidence on the issue of concerted action which could ever be presented by a plaintiff to establish a § 1 Sherman Act violation would be an actual memorialization of the conspiratorial agreement of the co-conspirators. In light of the covert nature of most conspiracies this evidence is unlikely to ever present itself. Indeed, this is the basis for the well-established principle that concerted action can be inferred from circumstantial evidence. *Supra* at 9. The Eighth Circuit's decision ignores this principle and in so doing renders future actions under § 1 of the Sherman Act virtually impossible. Indeed, the decision is tantamount to rejection of

the well-established rule in *Spray-Rite, supra*, 684 F.2d at 1238-1239 and *Filco, supra*, 1983-1 Trade Cases at 70,571 that a manufacturer's termination of a distributor in response to the price-related complaints of the distributor's competitors allows an inference of concerted action since the very essence of the decision is to require a memorialized agreement between the co-conspirators as would require no resort to inference whatsoever, the requisite concerted action would be established explicitly.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

PAUL H. SCHRAMM, ESQ.

(Counsel of Record)

M. HARVEY PINES, ESQ.

MARK S. CORMAN, ESQ.

SCHRAMM, PINES & SPEWAK

120 South Central, Suite 1404


St. Louis (Clayton),

Missouri 63105

(314) 721-5321

Attorneys for Petitioners

DATED: September 8, 1983.



Certificate of Service

The undersigned hereby certifies that he is a member of the Bar of the Supreme Court of the United States and that on September 8, 1983, he did serve three (3) copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit on each adverse party by mailing the aforesaid copies air mail or first-class mail, postage prepaid, to the following, being counsel for all adverse parties:

1. Robert H. Rawson, Jr., Esq. and
A. Theodore Gardiner, III, Esq.
Jones, Day, Reavis & Pogue
1700 Union Commerce Building
Cleveland, Ohio 44115;
2. Walter M. Clark, Esq. and
Thomas E. Wack, Esq.
Armstrong, Teasdale, Kramer & Vaughan
611 Olive Street
St. Louis, Missouri 63101;
3. William F. Baxter, Esq.,
Barry Grossman, Esq.,
John J. Powers, III, Esq., and
Edward T. Hand, Esq.
Department of Justice
Washington, D.C. 20530;
4. Richard Wolff, Esq.
120 South Central
Clayton, Missouri 63105;
5. C. William Portell, Jr., Esq.
317 North 11th Street
Suite 1200
St. Louis, Missouri 63101; and

6. Solicitor General
Department of Justice
Washington, D.C. 20530.

PAUL H. SCHRAMM
(One of the Attorneys for Petitioner)

APPENDIX

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 81-1585

Appeal from the United
States District Court for
the Eastern District of
Missouri.

Jeffrey B. Battle; Karen Battle,
d/b/a Bayview Service and
Supply Co.; and Anchor Supply
Co., Inc.,
Appellants,

v.

Gordon Watson and Thomas
Watson,

v.

The Lubrizol Corporation;
Jenkin-Guerin, Inc.; and
Jack K. Krause,
Appellees.

Submitted: March 14, 1982

Filed: July 12, 1983

Before LAY, Chief Judge; HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, and FAGG, Circuit Judges. *EN BANC*.

BRIGHT, Circuit Judge, with whom ROSS, JOHN R. GIBSON, and FAGG, Circuit Judges, join.

Jeffrey B. Battle, Karen Battle and two businesses which they control, Anchor Supply Co., and Bayview Service & Supply Co., brought this action alleging that the Lubrizol Corporation, Jenkin-Guerin, Inc. and Jack K. Krause, president of Jenkin-Guerin, violated section one of the Sherman Act. The district court¹ granted defendants' motion for summary judgment. The court recognized that "termination following complaint by the competitors of the terminated buyer is not sufficient to allow an inference of conspiracy." *Battle v. Lubrizol Corp.*, 513 F. Supp. 995, 998 (E.D. Mo. 1981). However, the district court ruled that hearsay evidence in the form of Krause's boastful statements was sufficient to raise a jury question as to whether Lubrizol was participating in a conspiracy rather than acting unilaterally in terminating plaintiffs as a distributor. *Id.* at 997-98. Nonetheless, the district court held that the plaintiffs had no right to recovery because there existed no evidence warranting the inference that Lubrizol was motivated by a desire to protect Jenkin-Guerin from price competition. *Id.* at 999. A panel of this court reversed the district court's judgment on appeal. *Battle v. Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982). In the course of its decision, the panel decided that Krause's boastful statements were inadmissible as hearsay to Lubrizol. *Id.* at 990. Hence, the panel had to "consider whether the com-

¹ The Honorable H. Kenneth Wangelin, United States Senior District Judge for the Eastern and Western Districts of Missouri. At the time Judge Wangelin decided this case, he was Chief Judge for the Eastern District of Missouri.

plaints and subsequent termination, standing alone, are sufficient to raise a reasonable inference of concerted action." *Id.* On the same day, a separate panel of this court filed an opinion which reached a result contrary to that in this case. *Rosech, Inc. v. Star Cooler Corp.*, 671 F.2d 1168 (8th Cir. 1982). We granted rehearing en banc in both cases. On October 1, 1982, while these cases were under consideration by the court en banc, the President appointed Judge George G. Fagg to succeed Judge Roy L. Stephenson, who assumed senior status on April 1, 1982. Judge Stephenson died on November 5, 1982. Because of the possibility of reaching inconsistent results in *Roesch* and *Battle*, the court resubmitted both cases en banc, with Judge Fagg voting on both cases. Thus, both cases were resubmitted to the new en banc court without oral argument.

The judgment of the district court in this case is affirmed by an equally divided court upon rehearing en banc. The essential facts in this case are not distinguishable from those in *Roesch*: a competing distributor complained to the manufacturer but received a neutral response; and later, the manufacturer made a unilateral decision to terminate the plaintiffs. Accordingly, we adopt the reasoning, as applicable to this case, of Judge Ross' opinion in *Roesch, Inc. v. Star Cooler Corp.*, No. 81-1562, slip op. (8th Cir.)(en banc), filed today. A manufacturer's termination after receiving complaints cannot be characterized in and of itself as responsive action permitting an inference of concerted action. To do so is to nullify the well-recognized rule that termination following complaints by competitors is not sufficient to allow an inference of concerted action.

McMILLIAN, Circuit judge, dissenting, with whom LAY, Chief Judge, HEANEY and ARNOLD, Circuit Judges, join.

I respectfully dissent. My reasons for dissenting from the court's decision affirming, by an equally divided vote, the judgment of the district court are essentially set forth in my majority opinion for the panel, *Battle v. Lubrizol Corp.*, 673 F.2d 984

(8th Cir. 1982). In light of the en banc opinions in this case and its companion case, *Roesch, Inc. v. Star Cooler Corp.*, No. 81-1562, I add the following comments.

The essential facts in each case are not distinguishable; however, I disagree with the synopsis set forth in the *Battle* en banc opinion, slip op. at 3: "a competing distributor complained to the manufacturer but received a neutral response; and later, the manufacturer made a unilateral decision to terminate the plaintiffs." This statement of facts would preclude a finding of an antitrust violation. I would modify the above statement of facts by adding that the distributor's complaints to the manufacturer were price-related and by deleting the reference to the manufacturer's *unilateral* decision to terminate the distributor. If one assumes that the manufacturer's decision to terminate was unilateral, then such a decision would have been lawful regardless of the manufacturer's concern with price. *E.g., United States v. Colgate*, 250 U.S. 300 (1919). Whether or not the manufacturer did act unilaterally is at issue in these cases. I would therefore rephrase the essential facts as follows: a competing distributor made price-related complaints about another distributor to the manufacturer; later, the manufacturer terminated the plaintiffs.¹

I agree that the mere receipt of complaints, even price-related complaints by a manufacturer, from one or more distributors

¹ This issue is now pending before the Supreme Court in *Monsanto Co. v. Spray-Rite Service Corp.*, 684 F.2d 1226, 1238-39 & n.7 (7th Cir. 1982) (citing the panel opinion in *Battle*), *cert. granted*, 103 S.Ct. 1249 (1983). One of the questions presented in the petition for certiorari is whether a *per se* unlawful vertical price-fixing conspiracy can be inferred solely from evidence that the manufacturer, concerned about resale prices, received price complaints from the distributor's competitors and later did not renew the distributor's contract. 51 U.S.L.W. 3627 (Mar. 1, 1983).

about the selling practices of another distributor do not “indicate illegal concerted action, [because] it is merely normal marketplace behavior for such complaints to be made.” *Roesch*, slip op. at 5, citing *Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 75, 80 (2d Cir. 1980), cert. denied, 454 U.S. 1083 (1981). See *Battle v. Lubrizol Corp.*, 673 F.2d at 991, citing *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980) (*Sweeney*), cert. denied, 451 U.S. 911 (1981).

I also agree, with minor modifications, with the definition of a *per se* violation set forth in *Roesch*, slip op. at 3-4: “a *per se* violation of section one would be established by proof that [the manufacturer] terminated its relationship with [the distributor] at the request of [another] competing [distributor or] distributors and that the termination was in pursuit of a price-related end.” See *Battle v. Lubrizol Corp.*, 673 F.2d at 990, citing *Contractor Utility Sales Co. v. Certain-Teed Products Corp.*, 638 F.2d 1061, 1072 & n.9 (7th Cir. 1981), *Alloy International Co. v. Hoover-NSK Bearing Co.*, 635 F.2d 1222, 1224 (7th Cir. 1980) (single dealer), and *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 170 (3d Cir. 1979) (single dealer). See also *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226, 1234 (7th Cir. 1982) (*Spray-Rite*), cert. granted, 103 S.Ct. 1249 (1983).

Moreover, I also agree with the statment that “a manufacturer’s termination after receiving complaints cannot be characterized in and of itself as responsive action permitting an inference of concerted action.” *Battle*, slip op. at 3; *Roesch*, slip op. at 4. Merely showing that the manufacturer terminated the distributor following receipt of complaints establishes only a sequential relationship; it does not establish a causal relationship between the two events. The relationship between the complaints and the termination is necessarily sequential because the terminated distributor could not complain if the termination preceded the receipt of complaints by the manufacturer; in that event there could be no casual relationship between the two

events at all. However, the inference of concerted action is not based upon the sequential relationship between the complaints and termination but upon the causal relationship between the two events, which is established by showing that the termination was *in response* to the complaints. Compare *Sweeney*, 637 F.2d at 116 (distinguishing sequence from consequence), with *id.* at 124-25 (Sloviter, J., dissenting) (emphasizing that "the mere fact that the manufacturer/supplier took some action will not suffice to establish the requisite combination unless such action were taken in response to such complaints"). Thus, I continue to be of the opinion that "proof of a dealer's complaints to the manufacturer about a competitor dealer's price-cutting, and the manufacturer's action [, that is, the termination of the misbehaving dealer,] *in response* to such complaints would be sufficient to raise an inference of concerted action." *Battle v. Lubrizol Corp.*, 673 F.2d at 991 (emphasis in original), citing *Sweeney*, 637 F.2d at 124-25 (Sloviter, J., dissenting); see also *Spray-Rite*, 684 F.2d at 1239.

I would argue that plaintiffs introduced sufficient evidence from which the jury could find that the manufacturer acted in response to the complaints and from that finding draw an inference of concerted action. Admittedly, the evidence of responsive action is circumstantial. However, it is unlikely that plaintiff would have or been able to discover any direct evidence that the manufacturer, in fact, acted in response to the complaints, or that the manufacturer told the complaining distributors that it would do so. That the manufacturer acted in response to the complaints of its distributors in terminating plaintiffs is not the only reasonable inference that can be drawn from the evidence. It would be equally permissible to infer that, as the manufacturer argued, plaintiffs were terminated because they violated their marketing agreement or were dishonest, or that the manufacturer terminated plaintiffs for price-related reasons but decided to do so unilaterally and independently of the complaints. It is a matter for the jury to decide which ex-

planation of the manufacturer's action is more plausible, particularly when the determination depends heavily upon the credibility of the witnesses.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 81-1562

Appeal from the United
States District Court
for the Eastern District
of Missouri

Roesch, Inc. and Marketing
Division, Inc.,
Appellants,

v.

Star Cooler Corporation, a
Missouri corporation; Hussmann
Refrigeration, Inc.; and Tour
Ice Midwest, Inc.,
Appellees.

Submitted: March 14, 1983

Filed: July 12, 1983

Before LAY, Chief Judge, HEANEY, BRIGHT, ROSS,
McMILLIAN, ARNOLD, JOHN R. GIBSON, and FAGG,
Circuit Judges, *en banc*.

ROSS, Circuit Judge.

Roesch brought this action alleging that defendants, Star Cooler, Hussmann and Tour Ice, violated section one of the Sherman Act. The district court¹ directed a verdict in favor of defendants finding insufficient evidence of an antitrust conspiracy. *Roesch, Inc. v. Star Cooler Corp.*, 514 F.Supp. 890 (E.D. Mo. 1981). A panel of this court affirmed the district court's judgment on appeal. *Roesch, Inc. v. Star Cooler Corp.*, 671 F.2d 1168 (8th Cir. 1982). On that same day a separate panel filed an opinion in *Battle v. Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982) which reached a result contrary to that in the present case. We accordingly granted rehearing *en banc* in both *Roesch* and *Battle*. On October 1, 1982, while the cases were under consideration by the court *en banc*, Judge George G. Fagg was appointed to succeed Judge Roy L. Stephenson, who assumed senior status on April 1, 1982. Judge Stephenson died on November 5, 1982. Because of the possibility of reaching inconsistent results in *Roesch* and *Battle* the court decided to resubmit both cases *en banc*, on the briefs, with Judge Fagg voting on both cases. Thus, the cases were resubmitted to the new *en banc* court without oral argument.

The judgment of the district court in this case is affirmed by an equally divided court upon rehearing *en banc*. The judgment, accordingly, is without precedential value and "the usual practice is not to express any opinion, for such expression is unnecessary where nothing is settled." *Ohio v. Price*, 364 U.S. 263, 264, 80 S.Ct. 1463, 1464 (1960). See, e.g., *Fair Assessment in Real Estate Assoc., Inc. v. McNary*, 622 F.2d 415 (8th Cir. 1980), *aff'd*, 454 U.S. 100 (1981). In the present case, however, because of the significance of the issue involved and the circumstances of the changed *en banc* panel, we elect to set forth

¹ The Honorable H. Kenneth Wangelin, Chief Judge for the Eastern District of Missouri.

our reasons for affirming the district court's judgment. We affirm essentially for the reasons discussed in the panel opinion.² *Roesch, Inc. v. Star Cooler Corp.*, *supra*, 671 F.2d 1168. We file this opinion as additional support for our position.

Initially, we note that a directed verdict for defendant is appropriate in an antitrust case where plaintiff fails to make a prima facie showing of a section one violation. *Oreck Corp. v. Whirlpool Corp.*, 639 F.2d 75, 78 (2d Cir. 1980), *cert. denied*, 454 U.S. 1083 (1981); *Edward J. Sweeney & Sons, Inc. v. Texaco*, 637 F.2d 105, 115 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); *Chisholm Bros. Farm Equip. Co.*, 498 F.2d 1137, 1139-40 (9th Cir.), *cert. denied*, 419 U.S. 1023 (1974). In reviewing a grant or denial of a motion for directed verdict this court must view the evidence in the light most favorable to the non-moving party and give that party the benefit of all reasonable inferences without assessing the credibility of witnesses. However, it is well settled that the jury

“is permitted to draw only those inferences of which the evidence is reasonably susceptible, and may not be permitted to resort to speculation.” *Viking Theatre Corp. v. Paramount Film Distrib. Corp.*, 320 F.2d 285, 296 (3d Cir. 1963), *aff'd by an equally divided court*, 378 U.S. 123, 84 S.Ct. 1657, 12 L.Ed.2d 743 (1964); see *Twin City Plaza, Inc. v. Central Sur. & Ins. Corp.*, 409 F.2d 1195, 1202-03 n.8 (8th Cir. 1969). When the evidence is so one-sided as to leave no room for any reasonable difference of opinion as to how the case should be decided, it should be decided by the court as a matter of law rather than submitted to a jury for its determination. *Kennedy v. U.S. Construction Co.*, 545 F.2d 81, 82 (8th Cir. 1976); *Gillette Dairy, Inc. v. Hydrotex Inds., Inc.*, 440 F.2d 969, 971 (8th Cir. 1971).

² The factual background of this case is set out in the district court and panel opinions and will not be repeated here.

Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 883 (8th Cir. 1978).

Section one, by its terms, requires proof of an agreement, conspiracy or combination in restraint of trade. 15 U.S.C. § 1. To establish the existence of such a conspiracy, Roesch was required to submit evidence from which a jury could have reasonably inferred that Star Cooler's decision to terminate Roesch was the direct result of a conscious commitment by defendants to a common scheme. *Edward J. Sweeney & Sons, Inc. v. Texaco*, *supra*, 637 F.2d at 111. Thus, a *per se* violation of section one would be established by proof that Star Cooler terminated its relationship with Roesch at the request of competing distributors and that the termination was in pursuit of a price related end. *Contractor Utility Sales Co. v. Certain-Teed Products Corp.*, 638 F.2d 1061, 1072 n.9 (7th Cir. 1981); *Alloy Int'l Co. v. Hoover-NSK Bearing Co.*, 635 F.2d 1222, 1225 (7th Cir. 1980); *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 170 (3d Cir. 1979). The district court held that there was no evidence of any conspiracy or concerted action between Star Cooler and any other person and further, that Roesch failed to prove that the alleged conspiracy "had the effect or was entered into with the intent of unreasonably restraining trade." *Roesch, Inc. v. Star Cooler Corp.*, *supra*, 514 F.Supp. at 893 and 895.

Roesch argues that the evidence demonstrates that employees of Tour Ice and Hussmann complained to Star Cooler about the low prices Roesch was quoting customers. Roesch maintains that his termination following the distributors' complaints presents strong circumstantial evidence of a section one violation.³ A careful examination of the evidence reveals only that an

³ Roesch relies on the Ninth Circuit decision in *Girardi v. Gates Rubber Company Sales Division, Inc.*, 325 F.2d 196 (9th Cir. 1963) in which that court found a section one conspiracy where one distributor was terminated following complaints by competing distributors. We agree with the district court's discussion of *Girardi* and its conclusion that "[t]his case has been often distinguished and is of questionable authority, and in any event is easily distinguished from the present case." *Roesch, Inc. v. Star Cooler Corp.*, 514 F.Supp. 890, 894 and n.5 (E.D. Mo. 1981).

employee of Tour Ice telephoned Star Cooler to ask whether Tour Ice was receiving the best price and that an employee of Hussmann called Star Cooler to determine why Roesch was quoting such low prices. Neither of the phone calls involved requests to terminate Roesch or threats of any other action. The evidence on the record is insufficient to prove that the phone calls constituted a conspiracy. The distributors' complaints were for the purpose of determining whether Star Cooler was treating its distributors fairly. Such complaints are not *per se* unlawful. *Westinghouse Elec. v. CX Processing Labs.*, 523 F.2d 668, 676 (9th Cir. 1975).

As the Second Circuit has held, it is not unlawful for a manufacturer to consult with its dealers and "those consultations, standing alone, would not establish the existence of a combination or agreement under the Sherman Act." *Borger v. Yamaha Int'l Corp.*, 625 F.2d 390, 395 (2d Cir. 1980). Moreover, complaints of one distributor about the selling practices of another do not "indicate illegal concerted action, since it is merely normal marketplace behavior for such complaints to be made." *Oreck Corp. v. Whirlpool Corp.*, *supra*, 639 F.2d at 80. Our reading of the record reveals only that employees of Tour Ice and Hussman called Star Cooler to inquire about the fairness with which Star Cooler treated its distributors. We are hardpressed to call these conversations "complaints." However, even if the phone calls are characterized as distributors' complaints, they do not rise to the level of illegal concerted action.

We conclude that Roesch presented insufficient evidence of a section one violation and thus the directed verdict for defendants is affirmed. The additional issues raised by Roesch were adequately discussed in the district court's memorandum. Based on this court's disposition of this case, we see no need to address those issues here.

The district court's judgment is affirmed by an equally divided court. Judges Bright, John R. Gibson and Fagg join in this opinion.

McMILLIAN, Circuit Judge, dissenting, with whom LAY, Chief Judge, HEANEY and ARNOLD, Circuit Judges, join.

I respectfully dissent for the reasons discussed in my dissenting opinion in the companion case decided today, *Battle v. Lubrizol Corp.*, No. 81-1585.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 81-1585

Appeal from the United
States District Court
for the Eastern District
of Missouri

Jeffrey B. Battle; Karen
Battle; d/b/a Bayview Service
and Supply Co.; and Anchor
Supply Co., Inc.,
Appellants,

Gordon Watson and Thomas
Watson,

v.

The Lubrizol Corporation;
Jenkin-Guerin, Inc.; and
Jack K. Krause,
Appellees.

Submitted: November 10, 1981

Filed: March 4, 1982

Before HEANEY and McMILLIAN, Circuit Judges, and BENSON,* District Judge.

McMILLIAN, Circuit Judge.

Jeffrey B. Battle, Karen Battle and two businesses which they control, Anchor Supply Co. (Anchor) and Bayview Service & Supply Co. (Bayview), appeal the district court's order of summary judgment and dismissal of their private antitrust action alleging that appellees, the Lubrizol Corporation, Jenkin-Guerin, Inc., and Jack K. Krause, president of Jenkin-Guerin, violated *inter alia* § 1 of the Sherman Act, 15 U.S.C. § 1. In that complaint, appellants charged that Lubrizol, a manufacturer of rustproofing compounds, conspired with one of its distributors, Jenkin-Guerin, to terminate appellants' distributorship for the purpose of restraining price competition. Appellants do not offer evidence to prove an anticompetitive effect on the market and rely solely on the principle enunciated in *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979) (*Cernuto*), that the concerted action alleged here, aimed at limiting price competition, has a *per se* anticompetitive impact on the market. The district court followed the *per se* analysis in *Cernuto*, but found the evidence insufficient to support a reasonable inference that appellants' termination by Lubrizol was motivated by a desire to protect Jenkin-Guerin from price competition and granted summary judgment against appellants. *Battle v. Lubrizol Corp.*, 513 F. Supp. 995 (E.D. Mo. 1981).

For reversal appellants argue that the evidence was sufficient to support an inference that Lubrizol stopped selling directly to appellants in order to protect appellants' competitor, Jenkin-

* The Honorable Paul Benson, Chief Judge, United States District Court for the District of North Dakota, sitting by designation.

Guerin, from price competition. For the reasons discussed below, we reverse and remand for further proceedings.

Facts

Lubrizol manufactures and sells Lubrizol 2085A, a rustproofing compound. Jenkin-Guerin is a wholesale distributor of chemical compounds, one of which is Lubrizol 2085A. Jenkin-Guerin packages and sells Lubrizol 2085A under the trademark "Anchor Tuflex." For a period of several months in late 1978 and 1979, Anchor Supply Co., controlled by Battle, purchased Lubrizol 2085A from Jenkin-Guerin and unsuccessfully attempted to compete for a share of the automobile rustproofing market. In July of 1979, appellants approached Lubrizol with a proposal to distribute Lubrizol 2085A for marine vessel and industrial rustproofing uses as well as limited automotive uses. Because of the competitive pricing aspects of the marine market, appellants requested a direct supply from Lubrizol at a lower price than they could obtain from Jenkin-Guerin. Interested in expanding into the marine market, Lubrizol agreed to supply Lubrizol 2085A directly to Bayview Service & Supply Co., another company controlled by Battle.

Although appellants apparently made some unsuccessful attempts to enter the marine vessel rustproofing market during the next few months, between October and December of 1979, Anchor was actively marketing Lubrizol 2085A under the name "Armor Shield" for automotive uses and soliciting Jenkin-Guerin's customers with some success by undercutting Jenkin-Guerin's prices. Sometime in January of 1980, Jack Krause, president of Jenkin-Guerin, learned of appellants' actions and made a series of telephone calls to Irwin Ehren, manager of rustproofing products for Lubrizol. It is undisputed that in these telephone calls Krause complained that appellants were selling Lubrizol 2085A to Jenkin-Guerin customers at prices lower than Jenkin-Guerin's. Krause was "upset" and wanted to know whether Lubrizol would continue to sell Lubrizol 2085A

to appellants. There is evidence from one of Krause's coworkers that before making one of these calls, Krause had commented to the office staff that he intended to force Lubrizol to stop supplying appellants with Lubrizol 2085A, and that after phoning Lubrizol, Krause boasted that he had done so.

Relying on the information supplied by Krause, Ehren informed George Arkedis, manager of Lubrizol's diversified products division, of the substance of the conversations. Arkedis then told William Bares, president of Lubrizol, that appellants were active in the automotive market rather than marine market and that Krause was concerned about the price competition. On February 26, 1980, Bares ordered that the direct supply of Lubrizol 2085A to Bayview be terminated. Subsequently, Lubrizol put appellants in contact with a Cleveland distributor of the compound, Eaton Oil Co., but Lubrizol has not reestablished direct supply. Appellants have been able to purchase Lubrizol 2085A through Eaton Oil. Appellants, however, now pay more for Lubrizol 2085A from Eaton Oil than when they bought from Lubrizol directly, although appellants still sell Lubrizol 2085A at a price which is lower than that offered by Jenkin-Guerin. Appellants brought this suit charging, *inter alia*, that Lubrizol and Jenkin-Guerin conspired to terminate their distributorship for the purpose of protecting Jenkin-Guerin from price competition in violation of § 1 of the Sherman Act. Appellees maintain that the distributorship was terminated because appellants misrepresented their intended marketing plans when applying for a direct supply and because appellants were not honest in the negotiations.

Summary Judgment

This appeal followed the entry of summary judgment. Summary judgments are somewhat disfavored in antitrust cases, especially when motive or intent is at issue. *See Poller v. Columbia Broadcasting System*, 368 U.S. 464, 491 (1962). However, summary judgement is not necessarily precluded in antitrust

litigation. As noted by the Supreme Court in *First National Bank v. Cities Service Co.*, 391 U.S. 253, 290 (1968):

While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

See also *Aladdin Oil Co. v. Texaco, Inc.*, 603 F.2d 1107, 1110-12 (5th Cir. 1979). Like the district court, we must view the evidence in the light most favorable to the nonmoving party, giving that party the benefit of all reasonable inferences without assessing credibility. Only if the evidence is so one-sided that it leaves no room for any reasonable difference of opinion as to any material fact should the case be decided by the court as a matter of law rather than be submitted to the jury. See, e.g., *Admiral Theatre Corp. v. Douglas Theatre Co.*, 585 F.2d 877, 883 (8th Cir. 1978).

"Vertical" Horizontal Restraint or "Horizontal" Vertical Agreement?

This case presented the following question of law: after *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (*GTE Sylvania*), is the *per se* rule or the rule of reason appropriate in determining whether a technically vertical restraint of trade, which smacks of horizontal pricing interference, unduly restrains trade under § 1 of the Sherman Act. If the rule of reason is the appropriate test to prove a violation of § 1, a plaintiff must show that the combination or conspiracy produced actual anticompetitive effects within the relevant market. Appellants in the present case made no attempt to proffer such market evidence but instead argued that the alleged conspiracy constitutes a *per se* violation of the Act, thus requiring no proof of actual harmful impact on the market.

Per se violations are exceptions to the rule of reason. *Northern Pacific R.R. v. United States*, 356 U.S. 1, 5 (1958), set forth the standard for a *per se* violation: "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal." "Among those business practices that have been treated as *per se* violations are price fixing, resale price maintenance, group boycotts, tying arrangements, and certain types of reciprocal dealing." *Cernuto, supra*, 595 F.2d at 166 (footnotes omitted). *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940) (*Socony-Vacuum*), continues to stand for the principle that conduct with the purpose and effect of restraining price movement and the free play of market forces among competitors is illegal *per se*: "Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they . . . stabilized prices they would be directly interfering with the free play of market forces." See also *United States v. National Society of Professional Engineers*, 435 U.S. 679, 692 (1978) (central importance of price). Here, appellants alleged that one distributor successfully foreclosed the possibility of price competition by a competitor through a combination or conspiracy with a common supplier. Such conduct, once proven, appellants argue, would be an example of that "pernicious" behavior condemned by *Socony-Vacuum*.

The Supreme Court, however, declared in *GTE Sylvania* that because vertical trade restraints, i.e., those imposed by a supplier or manufacturer on a distributor, may have redeeming procompetitive aspects, a rule of reason analysis should be used to determine the net effect on the market. In *GTE Sylvania*, a manufacturer terminated the plaintiff's distributorship when the plaintiff began to sell the product at an outlet outside its allotted territory. The Court upheld this action, reasoning that while the manufacturer's exclusive franchise marketing plan might stifle *intraband* competition or competition among

dealers of the same product in a given area, it could also serve to stimulate *interbrand* competition or competition among different manufacturers of comparable products. 433 U.S. at 56-58.

Appellees argue that *GTE Sylvania* precludes use of the *per se* rule for any vertically imposed restraint except those expressly retained by the *GTE Sylvania* decision, i.e., price fixing and resale price maintenance, *id.* at 51 n.18. See *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir.) (banc), *cert. denied*, 439 U.S. 946 (1978) (applying rule of reason analysis); *accord*, *Gough v. Rossmoor Corp.*, 585 F.2d 381 (9th Cir. 1978), *cert. denied*, 440 U.S. 936 (1979); *H & B Equipment Co. v. International Harvester Co.*, 577 F.2d 239 (5th Cir. 1978); see generally Comment, *Vertical Agreements to Terminate Competing Distributors: Oreck Corp. v. Whirlpool Corp.*, 92 Harv. L. Rev. 1160 (1979) (supporting *Oreck*); Comment, *Vertical Agreement as Horizontal Restraint: Cernuto, Inc. v. United Cabinet Corp.*, 128 U. Pa. L. Rev. 622 (1980) (supporting *Cernuto*). We agree, however, with the Third Circuit that such an expansive interpretation of *GTE Sylvania* is unwarranted absent a clear expression of such intent by the Supreme Court. *Cernuto, supra*, 595 F.2d at 167 n.15, citing *GTE Sylvania, supra*, 433 U.S. at 51 n.18. See also *Contractor Utility Sales Co. v. Certain-Teed Products Corp.*, 638 F.2d 1061, 1072 n.9 (7th Cir. 1981) (*Contractor Utility*). Like the *Cernuto* court, "we are not persuaded that the law's tolerance of reasonable restraints designed to improve the manufacturer's competitive position may be converted into a blanket allowance of *any* marketing decision made by a manufacturer." 595 F.2d at 167-68 (emphasis in original). As noted by Professor Sullivan,

It does not follow from the fact that a manufacturer may, when franchising a dealer, commit itself not to franchise another in a territory defined by the manufacturer, that it may, having earlier franchised two or more dealers, agree at the request of one to terminate the others. It is not

merely that the latter promise liquidates palpable interests of existing traders, while the former does not (a difference which is real enough, and which is charged with meaning for the procedural and damage aspects of the law); it is also that the competitive effect of the first promise is less severe than that of the second. The first commitment forecloses potential intraband competition only; the second stamps out existing competition at the behest of a firm which is suffering under it.

....

... When the manufacturer sets up a dealership structure and binds itself not to add dealers in any existing territory, we truly have a vertical structure. But when an existing dealer enlists the manufacturer to choke off one of the dealer's competitors, although the "agreement" which enables Section 1 to be invoked is vertical [(manufacturer-dealer)], the restraint thereby achieved is horizontal in its impact [(dealer-dealer)]; it is an attack by one dealer against another.

L. Sullivan, Antitrust § 148, at 427-29 (1977). "The supplier [or manufacturer] participates merely as the 'enforcement agent' in furthering the distributors' [or dealers'] anticompetitive and horizontal purposes." Comment, *Vertical Agreement as Horizontal Restraint*, *supra*, 128 U. Pa. L. REv. at 635, citing Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. Chi. L. Rev. 1, 17 (1977) (Professor Posner recently advanced a *per se* legality theory of restricted distribution; see Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6 (1981)).

Moreover, there are significant differences between the alleged conspirators' intent and the competitive impact found in *GTE Sylvania* and in the present case. First, as noted in *Cernuto*,

[w]hen a manufacturer acts on its own, in pursuing its own market strategy, it is seeking to compete with other manufacturers by imposing what may be defended as reasonable vertical restraints. This would appear to be the rationale of the *GTE Sylvania* decision. However, if the action of a manufacturer or other supplier is taken at the direction of its customer, the restraint becomes primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier. Therefore, although the termination in such a situation is, itself, a vertical restraint, the desired impact is horizontal and on the dealer, not the manufacturer, level.

595 F.2d at 168. Thus, the alleged purpose and effect of the dealer termination in the present case was to eliminate or reduce intrabrand competition at the dealer or distributor level and not to increase interbrand competition at the manufacturer or supplier level as in *GTE Sylvania*. Second, *GTE Sylvania* involved a nonprice vertical restraint, a restriction on the location from which the dealer could sell the manufacturer's products. 433 U.S. at 37. In contrast, price and price competition was allegedly the key factor in the present case and in *Cernuto, supra*, 595 F.2d at 168-69; in each case the dealer complained to the manufacturer that the competing dealer was selling the manufacturer's products in its territory and at lower prices.

In *United States v. General Motors Corp.*, 384 U.S. 127 (1966) (a decision prior to, but expressly affirmed by *GTE Sylvania, supra*, 433 U.S. at 58 n.28), the Court found a *per se* violation where the manufacturer bowed to retailers' complaints by pressuring other retailers not to deal with discounters. Although *General Motors* involved dual conspiracies, retailer-retailer and retailer-manufacturer, the Court's application of the *per se* rule points to the importance of the underlying horizontal nature of the arrangement. 384 U.S. at 144-45. Substance should be more important than form.

We do not think the horizontal impact is diminished because the alleged combination or conspiracy consists of only one member of the plaintiff's distribution level and a common supplier. Compare *Alloy International Co. v. Hoover-NSK Bearing Co.*, 635 F.2d 1222, 1224 (7th Cir. 1980) (single dealer), and *Cernujo*, *supra*, 595 F.2d at 165 (single dealer), with *Gough v. Rossmoor Corp.*, *supra*, 585 F.2d at 387 ("In all cases so far holding such restraints to be *per se* unreasonable, there has been some horizontal concert of action taken against the victims of the restraint."); *Oreck Corp. v. Whirlpool Co.*, *supra*, 579 F.2d at 131-33; *H & B Equipment Co. v. International Harvester Co.*, *supra*, 577 F.2d at 245 ("Conspiracies between a manufacturer and its distributors are only treated as horizontal, however, when the source of the conspiracy is a combination of the distributors."). As noted in Comment, *Vertical Agreement as Horizontal Restraint*, *supra*, 128 U. Pa. L. Rev. at 641-42 (emphasis in original, footnotes omitted):

[H]orizontal plurality is not the real determinant of *per se* unreasonableness. The essence of a violation of section 1 of the Sherman Act is agreement to pursue illegal conduct. A combination to cut a retailer off from a source of supply is not any less an illegal *agreement* because only one, rather than a plurality, of the parties is on the affected level. Nor is the effect of the combination any less harmful. A dealer's success in using the refusal-to-deal weapon to strike at a competitor depends on enlisting the cooperation of their mutual supplier, not the other competing dealers.

If a distributor can establish that a manufacturer or common supplier terminated its existing supply relationship at the request of a competing distributor and the termination was motivated by a desire on the part of the manufacturer to reduce or eliminate price competition for the other distributor, then a *per se* violation of § 1 of the Sherman Act has been established. *Contractor Utility*, *supra*, 638 F.2d at 1072 & n.9; *Alloy International Co. v. Hoover-NSK Bearing Co.*, *supra*, 635 F.2d at

1224; *Cernuto, supra*, 595 F.2d at 170. Here, the district court found that the evidence, when viewed in the light most favorable to appellants, was sufficient to support the reasonable inference that Lubrizol and Jenkin-Guerin acted in concert, but insufficient to support the reasonable inference that Lubrizol acted with a desire to protect Jenkin-Guerin from price competition, and therefore granted summary judgment against appellants. 513 F. Supp. at 998-99. We will address these requirements individually.

Concerted Action

In finding an inference of concerted action, the district court considered: (1) Krause's telephone calls to Lubrizol complaining of appellants' competition and the subsequent termination by Lubrizol of appellants and (2) evidence that Krause boasted to his office staff that, first, he could pressure Lubrizol into cutting off appellants' supply and, later, that he had in fact been successful. The district court concluded that the evidence of Krause's complaints and Lubrizol's subsequent termination of appellants' direct supply, standing alone, was insufficient to raise an inference of concerted action, *id.* at 997, but that this evidence, when considered with Krause's statements to his office staff, was sufficient to raise an inference of concerted action. *Id.* at 998.

Lubrizol argues, however, that Krause's statements are inadmissible as hearsay against Lubrizol under Fed. R. Evid. 801(d)(2)(E) because there was insufficient independent evidence to show that the parties were participating in a conspiracy and the statements were not made "in furtherance of a conspiracy." Krause's statements would be admissible against him only under Fed. R. Evid. 801(d)(2)(A) as admissions. See *United States v. Bell*, 573 F.2d 1040 (8th Cir. 1978); *United States v. Macklin*, 573 F.2d 1046 (8th Cir.), *cert. denied*, 439 U.S. 852 (1978). Because we agree that Krause's statements to his office staff were not made "in furtherance of the conspiracy," see *United States v. Wilson*, 490 F.Supp. 713, 714

(E.D. Mich. 1980), *aff'd per curiam*, 639 F.2d 314 (6th Cir. 1981); *United States v. Green*, 600 F.2d 154, 157-58 (8th Cir. 1979) (*per curiam*), we must consider whether the complaints and subsequent termination, standing alone, are sufficient to raise a reasonable inference of concerted action.

In *Edward J. Sweeney & Sons v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 101 S. Ct. 1981 (1981), the Third Circuit considered a similar question. Sweeney, a discount gasoline wholesaler and distributor, had a favorable hauling agreement changed and later his distributorship terminated after other Texaco retailers complained of his price cutting practices. In affirming a summary judgment against Sweeney, the majority held as a matter of law that the mere temporal relation between complaints by competitors and termination by a common supplier does not necessarily raise an inference of concerted action:

The necessary first step toward appellants' proof of a prohibited § 1 conspiracy was proof of a causal relationship between competitor complaints that Sweeney was selling Texaco gasoline several cents below their own price, and the reduction of Sweeney's hauling allowance. The mere reception of complaints by Texaco would be insufficient to prove this causal nexus. Nor would it suffice to prove only that some Texaco employees who knew of the complaints were also the ones who decided to terminate Sweeney's distributorship agreement and change its hauling allowance. The evidence must permit the inference that the alleged conspirators "had a unity of purpose or a common design and understanding, or a meeting of the minds."

Id. at 111 (citations and footnote omitted). To hold otherwise would disrupt normal and reasonable business communications between a supplier and its customers. As noted by the majority in *Sweeney*,

There are special reasons for applying this precept to a case in which a manufacturer receives price cutting complaints from competitors of a particular customer. To permit the inference of concerted action on the basis of receiving complaints alone and thus to expose the defendant to treble damage liability would both inhibit management's exercise of its independent business judgment and emasculate the terms of the statute. As Professor Areeda has explained, many cut off dealers in this situation will be tempted to harass their former suppliers with treble damage suits. Recognizing the potential for harassment, courts should hesitate to scrutinize too closely the supplier's ambiguous refusal to sell.

Id. at 111 n.2, citing P. Areeda, *Anti-Trust Analysis* 560 (2d ed. 1974).

In *Sweeney*, the majority reviewed *Sweeney's* evidence and concluded that the evidence failed to show that *Texaco's* actions had contradicted the refiner's economic self-interest, proof of acts against economic interest and motivation to enter an agreement being the "two elements generally considered critical in establishing conspiracy from evidence of parallel business behavior." " *Id.* at 114, citing *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309, 1314 (3d Cir. 1975). By lowering the hauling allowance, *Texaco* saved \$58,000 per year in sales to *Sweeney*, an action not in contradiction to its economic interests and which thus negated one element necessary to establishing concerted action circumstantially. 637 F.2d at 114. Moreover, the majority also found that the facts "militate[d] strongly against a causal relation between the complaints and *Texaco's* actions." *Id.* *Texaco* had realized its unfavorable position in its hauling agreement with *Sweeney* some five years prior to taking action. It had also learned of *Sweeney's* practice of representing non-*Texaco* fuel as *Texaco* fuel and had received many consumer complaints about service and credit card irregularities at *Sweeney's* stations.

We agree with the majority in *Sweeney* that the mere receipt by a manufacturer of dealer complaints about another dealer's market behavior would not be sufficient evidence to raise an inference of concerted action. *Id.* at 111 (mere reception of complaints by Texaco would be insufficient to prove causal nexus between competitor complaints that Sweeney was selling Texaco gasoline several cents below their own price and the reduction of Sweeney's hauling allowances). However, we do not agree that "even if appellants had demonstrated that Texaco's actions were in response to these complaints, such evidence alone would not show the necessary concerted action." *Id.* at 110, 116. To the contrary, we conclude that proof of a dealer's complaints to the manufacturer about a competitor dealer's price cutting and the manufacturer's action *in response* to such complaints would be sufficient to raise an inference of concerted action. *See id.* at 124-25 (Sloviter, J., dissenting). A showing of *responsive action* on the part of the manufacturer is necessary; there must be evidence of a causal relationship between the competitor dealer's price-related complaints and the manufacturer's action. "[T]he mere fact that the manufacturer/supplier took some action will not suffice to establish the requisite combination unless such action was taken in response to such complaints." *Id.* at 125 (Sloviter, J., dissenting).

We hold only that evidence of receipt by the manufacturer of a competitor dealer's price-related complaints and responsive action by the manufacturer against the offending dealer raises a reasonable inference of concerted action in violation of section 1 of the Sherman Act. Such evidence does not conclusively establish liability. As noted in Comment, *Vertical Agreement as Horizontal Restraint*, *supra*, 128 U. Pa. L. Rev. at 647-48 (footnotes omitted):

A manufacturer may have numerous legitimate reasons for terminating a dealer that coincide with the illegitimate reasons of the distributor demanding termination of its competitor. For instance, a violation of a distribution con-

tract may come to the manufacturer's attention only through the complaint of another dealer that maintains a close and jealous watch upon its rivals' activities.* . . .

. . . .

. . . This evidence might include explanations such as the dealer's violation of a marketing agreement, protection of product integrity, unsatisfactory dealer performance, instability of the dealer's business, the dealer's dishonesty, shortage of supply, or reorganization of the marketing system.

Here, we think there was sufficient evidence to raise an inference of concerted action. Appellants presented evidence that Krause complained to Lubrizol about appellants' price cutting and sales to Jenkin-Guerin customers in January 1980, that Lubrizol actually received these complaints, that the Lubrizol officials who made supply decisions knew about these complaints and the substance of the complaints, and that Lubrizol terminated appellants' direct supply of Lubrizol 2085A in February 1980, thus eliminating appellants as competitors on the same level of distribution as Jenkin-Guerin and reducing the difference between appellants' prices and Jenkin-Guerin's prices. This evidence is circumstantial. However, we think that it is most unlikely that antitrust plaintiffs, like any other plaintiffs alleging conspiracy, will have direct evidence.

Lubrizol argues that it terminated appellants' direct supply because appellants violated their marketing agreement to develop principally marine applications for Lubrizol 2085A and

* Indeed, one of the manufacturer's most valuable sources of information about the operation of its distribution channel is communications from its dealers. See Comment, *Vertical Agreements to Terminate Competing Distributors*: Oreck Corp. v. Whirlpool Co., 92 Harv. L. Rev. 1160, 1169 (1979).

because appellants were dishonest in their pre-distribution negotiations. Lubrizol also argues that its actions were unilateral and wholly independent of Krause's complaints. We think that these arguments are properly directed to the jury. The jury could have reasonably found that, as appellants contend, Lubrizol terminated appellants' direct supply pursuant to an understanding or agreement with Jenkin-Guerin for the purpose of reducing price competition between Jenkin-Guerin and appellants or that, as Lubrizol and Jenkin-Guerin contend, Lubrizol independently decided to terminate appellants' direct supply and did so for reasons that were not price-related.

Price-related Complaints

In the preceding discussion we presumed that Krause's complaints to Lubrizol were in fact price-related. The district court, however, found that there was no evidence to support the inference that Lubrizol was motivated by a desire to protect Jenkin-Guerin from price competition and that Krause's complaints did not show that Krause was concerned with price competition. 513 F. Supp. at 999. The second finding is contradicted by the record and by the district court's memorandum opinion which states that "Krause, in his capacity of chief operating officer of Jenkin-Guerin, complained to Lubrizol that [appellants] were selling to Jenkin-Guerin's automotive customers at a price under that offered by Jenkin-Guerin." *Id.* at 997.

We agree that there is no direct evidence that Lubrizol was motivated by a desire to protect Jenkin-Guerin from price competition. We would be somewhat surprised to find any direct evidence of this nature. However, there was sufficient circumstantial evidence, when viewed most favorably to appellants, to suggest that Lubrizol terminated appellants' direct supply of Lubrizol 2085A in order to protect Jenkin-Guerin from price competition. Krause's complaints clearly referred to appellants' lower prices; Krause wanted to know whether Lubrizol would continue to sell Lubrizol 2085A to appellants. The record indicates that Jenkin-Guerin was Lubrizol's third

largest purchaser of Lubrizol 2085A during 1979 and most of 1980. Under the circumstances, we think that this evidence reasonably supports an inference that Lubrizol was motivated by a desire to protect Jenkin-Guerin from price competition.

Accordingly, we reverse the order of summary judgment and remand the case for further proceedings. The only issue before us on appeal was the propriety of summary judgment. We of course express no opinion whatsoever with respect to the merits of the position of any party to this action.

BENSON, District Judge, Dissenting.

I respectfully dissent.

In argument before this court, appellants-plaintiffs did not take issue with the trial court's findings that:

Plaintiffs herein admit that they are unable to establish the anti-competitive effect necessary to prove a violation of the Sherman Act under the rule of reason.

Battle v. Lubrizol Corporation, 513 F.Supp. 995, 998 (E.D. Mo. 1981).

The trial court, however, has been reversed on a holding of this panel that there is evidence in the case which "reasonably supports an inference that Lubrizol was motivated by a desire to protect Jenkin-Guerin from price competition," *ante*, at 16, thereby presumably proving a per se unreasonable restraint of trade violation of the Sherman Act. The evidence in the case which this panel concludes is sufficient to support the inference is best set out by quoting from the trial court's opinion:

Lubrizol's evidence in this regard has not been disputed by plaintiffs. Lubrizol never discussed with plaintiffs the price at which they should resell Lubrizol 2085A. Jeffrey Battle, in his deposition, even went so far as to state that Lubrizol told him that what he did with the product after he acquired it was none of Lubrizol's business, and that

Lubrizol didn't want to know what Battle charged for it. Likewise, Gordon Watson testified that Lubrizol never suggested the price at which Jenkin-Guerin should resell the product. After it refused to sell directly to plaintiffs, Lubrizol put plaintiffs in contact with its Cleveland area distributor, who now supplies plaintiffs with all the Lubrizol 2085A they desire. Plaintiffs continue to resell the product at a price lower than that offered by Jenkin-Guerin.

Against this evidence that Lubrizol was not, in fact, motivated by a desire to protect Jenkin-Guerin from price competition when allegedly agreeing with Jenkin-Guerin to terminate plaintiffs, plaintiffs' only evidence is that Krause mentioned price when complaining to Lubrizol.

Id. at 999.

Neither the appellants nor this panel suggest that the trial court has misstated the evidence. The panel's comments that:

Krause's complaints clearly referred to appellants' lower prices; Krause wanted to know whether Lubrizol would continue to sell Lubrizol 2085A to appellants. The record indicates that Jenkin-Guerin was Lubrizol's third largest purchaser of Lubrizol during 1979 and most of 1980.

ante, at 16, merely enlarge the trial court's findings without significantly changing them.

There is no suggestion from any of the parties in the case that additional evidence is available to be brought before the court. The case relates to a business arrangement that is essentially "vertical." To hold that the facts, all undisputed, could conceivably support a finding of a *per se* violation seems to me to extend the *per se* doctrine beyond that heretofore enunciated by the courts. See *White Motor Co. v. United States*, 372 U.S. 253 (1963); *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958); *Mackey v. National Football League*, 543 F.2d 606

(8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1978); *Butera v. Sun Oil Company, Inc.*, 496 F.2d 434 (1st Cir. 1974); *Worthen Bank & Trust Company v. National BankAmericard Incorporated*, 485 F.2d 119 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974).

I would affirm the decision of the district court.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX D

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

No. 80-538 C (2)

Jeffrey B. Battle,
et al.,
Plaintiffs,

vs.

The Lubrizol
Corporation, et al.,
Defendants.

ORDER

(Filed May 11, 1981)

Pursuant to the memorandum filed herein this day,

IT IS HEREBY ORDERED that the Lubrizol Corporation's motion for summary judgment be and is granted and that Counts I and II of plaintiffs' complaint be and is dismissed as to said defendant.

John F. Nangle
United States District Judge

Dated: May 11, 1981.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 80-538 C (2)

Jeffrey B. Battle,
et al.,

Plaintiffs,

vs.

The Lubrizol
Corporation, et al.,

Defendants.

MEMORANDUM

(Filed May 11, 1981)

This case is now before the Court on the motion of defendant Lubrizol Corporation for summary judgment. The instant motion relates to Counts I and II of plaintiffs' complaint, the only counts in which Lubrizol is named as a defendant. In those counts, plaintiffs¹ allege that Lubrizol conspired with co-defendants Jenkin-Guerin, Inc., a competitor of plaintiffs in the rustproofing materials market and a customer of Lubrizol, and Jack Krause, Jenkin-Guerin's chief operating officer, to cut off plaintiffs' supply to Lubrizol's rustproofing compound, Lubrizol 2085A. Lubrizol allegedly refused to sell Lubrizol 2085A to plaintiffs at the behest of Jenkin-Guerin and Krause, in order to protect Jenkin-Guerin from price competition. These actions are allegedly violative of federal and state anti-trust laws, as well as common law.

¹ Plaintiffs in this case are Jeffrey and Karen Battle and two businesses which they control, Anchor Supply Co., Inc. and Bayview Service and Supply Co.

Lubrizol's proof in support of the instant motion establishes that it initially decided to sell its rustproofing compound to plaintiffs after plaintiffs were recommended by Gordon Watson, a salesman for Jenkin-Guerin who subsequently left Jenkin-Guerin and joined Anchor Supply Co., Inc. In the negotiations leading to sales to plaintiffs, Jeffrey Battle represented to Lubrizol that he intended to market Lubrizol's product for marine applications, a previously untouched market. Lubrizol was satisfied with its distribution system as it related to the automotive rustproofing market, and would not have sold directly to plaintiffs had they merely sought to sell in that market. Battle's representation that he intended to pursue the marine market induced Lubrizol to sell directly to plaintiffs.

Lubrizol's decision to terminate plaintiffs as direct purchasers arises out of the foregoing factual background, none of which is seriously disputed by plaintiffs. After the initial sales of Lubrizol's product to plaintiffs, Lubrizol became aware that plaintiffs were not, in fact, pursuing the marine market. Lubrizol received calls from its co-defendants to this effect. Krause, in his capacity of chief operating officer of Jenkin-Guerin, complained to Lubrizol that plaintiffs were selling to Jenkin-Guerin's automotive customers at a price under that offered by Jenkin-Guerin. It is at this point that the parties' versions of the facts diverge.

Lubrizol contends, and has adequately supported this contention in the instant motion for summary judgment, that Krause's complaints about plaintiffs did not affect its decision to terminate its sales to plaintiffs. Lubrizol claims that plaintiffs were cut off because they were not pursuing the marine market as Lubrizol expected them to, and because Lubrizol considered Battle to have been untruthful in the negotiations leading up to the initial sales.

Plaintiffs, of course, contend otherwise. In support of their position that Lubrizol cut them off at its co-defendants' request due to plaintiffs' pricing policy, plaintiffs point to the admitted

fact that Krause complained to Lubrizol about plaintiffs' competition and that plaintiffs were terminated shortly thereafter. Plaintiffs also rely on evidence to the effect that Krause had boasted to co-employees that he would force Lubrizol to cut off plaintiffs' supply, and that after phoning Lubrizol, Krause claimed to have arranged with Lubrizol to cut off plaintiffs.

A supplier is, of course, free to unilaterally choose with whom it will do business, *United States v. Colgate & Co.*, 250 U.S. 300 (1919), and the Sherman Act does not infringe upon the supplier's right to unilaterally decide not to deal with a particular buyer. The decision not to deal with a particular buyer must, in fact, be unilateral, however; if the decision is made in agreement with others an anti-trust violation may be found. *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3rd Cir. 1979); *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir. 1978). Lubrizol argues that summary judgment is appropriate in the instant case since the undisputed evidence establishes that its decision to cut off plaintiffs was made unilaterally and for valid business reasons. This Court can not agree.

In ruling on the instant motion for summary judgment, this Court must resolve all factual disputes in favor of plaintiffs. Plaintiffs' evidence shows that Krause complained to Lubrizol about plaintiffs' competition and about their sales to Jenkin-Guerin's customers at prices lower than those offered by Jenkin-Guerin, and that Lubrizol cut off plaintiffs' supply shortly after these complaints. This evidence, standing alone, is not sufficient to withstand the instant motion for summary judgment. *Sweeney & Sons, Inc. v. Texaco, Inc.*, 1980-81 T.C. ¶63,611 (3rd Cir. 1980); *Oreck Corp. v. Whirlpool Corp.*, 1980-81 T.C. ¶63,619 (2d Cir. 1980); *Carr Electronics Corp. v. Sony Corp. of America*, 472 F.Supp. 9 (N.D. Cal. 1979).

Plaintiffs do not rest on only this evidence, however. They have also shown that Krause said he intended to force Lubrizol to stop supplying plaintiffs with Lubrizol 2085A, and that after

phoning Lubrizol, he boasted that he had done so. Lubrizol contends that even this evidence fails to establish concerted action on the part of the defendants. Though the evidence in this regard is slim and the requisite inference of concerted activity correspondingly great, this Court believes plaintiffs' evidence is sufficient to raise a jury question as to whether Lubrizol, in fact, acted unilaterally.

In any case in which a terminated buyer claims the termination was due to concerted action, there is likely to be no direct evidence of an agreement between the defendants. Rational businessmen simply do not put such agreements in writing. Absent a disillusioned ex-employee of one of the alleged conspirators who will testify to the alleged agreement, a terminated buyer must of necessity rely on circumstantial evidence to prove a conspiracy. The courts have held that termination following complaint by the competitors of the terminated buyer is not sufficient to allow an inference of conspiracy. *Sweeny & Sons, Inc.*, *supra*; *Oreck Corp. v. Whirlpool Corp.*, 1980-81 T.C. ¶63,619 (2d Cir. 1980); *Carr Electronics Corp.*, *supra*; c.f. *Girardi v. Gates Rubber Company Sales Division, Inc.*, 325 F.2d 196 (9th Cir. 1963). Even when not considering Krause's statements as proof of an actual conspiracy, the statements at least establish that Krause intended to reach an agreement with Lubrizol and thought that he had. Such evidence is obviously relevant to whether an agreement was actually reached. This Court believes this additional evidence is sufficient to allow an inference of concerted action.

Even assuming that this inference is allowable, however, Lubrizol contends that summary judgment is appropriate since plaintiffs can not show the necessary anti-competitive effect of the termination. A combination or agreement in restraint of trade is unlawful under the Sherman Act only if it unreasonably affects trade or commerce. *Northern Pac. R. Co. v. United States*, 356 U.S. 1 (1958); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). Under the "rule of reason" applied in such cases,

it must be shown that the combination or agreement produced adverse, anti-competitive effects within the relevant product and geographic markets. *Id.* Some agreements or combinations are considered so lacking in redeeming virtue, however, that they are conclusively presumed illegal without inquiring into the actual effect on competition. *Northern Pac. R. Co.*, *supra*. Such agreements are considered illegal *per se*.

Plaintiffs herein admit that they are unable to establish the anti-competitive effect necessary to prove a violation of the Sherman Act under the rule of reason. They contend, however, that they were terminated by Lubrizol to protect Jenkin-Guerin from price competition, and that this price-related termination constitutes a *per se* violation of the Sherman Act.

Combinations and agreements interfering with the pricing mechanisms of the free market have been particularly suspect under the Sherman Act. As the Supreme Court has stated, "price is the 'central nervous system of the economy,'" *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59, and an agreement that 'interfere[s] with the setting of price by free market forces' is illegal on its face. *United States v. Container Corp.*, 393 U.S. 333, 337." *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978). Several courts have therefore held that a *per se* violation of the Sherman Act is established upon proof that a manufacturer terminated its relationship with a distributor at the request of a competitor of the distributor, and that the termination was motivated by a desire to protect the competitor from price competition. *Cernuto, Inc.*, *supra*; *CUSCO v. Certain-teed Products Corp.*, 1980-81 T.C. ¶63,714 (7th Cir. 1981); *Alloy International Co. v. Hoover-NSK Bearing Co.*, 1980-1 T.C. ¶63,148 (7th Cir. 1980); *Mannington Mills v. Congoleum Industries, Inc.*, 610 F.2d 1059 (3rd Cir. 1979). If the agreement to terminate the distributor is not premised on a price related end, however, the rule of reason is applicable. *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir. 1978); *Ron Tonkin Gran Turismo v. Fiat Distributors*, 637

F.2d 1376 (9th Cir. 1981); *Borger v. Yamaha Intern. Corp.*, 625 F.2d 390 (2d Cir. 1980); Resolution of the instant motion for summary judgment is therefore dependent on whether the alleged agreement was premised on a price related end, since plaintiffs admit they can not show an anti-competitive effect under the rule of reason.

Lubrizol's evidence in this regard has not been disputed by plaintiffs. Lubrizol never discussed with plaintiffs the price at which they should resell Lubrizol 2085A. Jeffrey Battle, in his deposition, even went so far as to state that Lubrizol told him that what he did with the product after he acquired it was none of Lubrizol's business, and that Lubrizol didn't want to know what Battle charged for it. Likewise, Gordon Watson testified that Lubrizol never suggested the price at which Jenkin-Guerin should resell the product. After it refused to sell directly to plaintiffs, Lubrizol put plaintiffs in contact with its Cleveland area distributor, who now supplies plaintiffs with all the Lubrizol 2085A they desire. Plaintiffs continue to resell the product at a price lower than that offered by Jenkin-Guerin.

Against this evidence that Lubrizol was not, in fact, motivated by a desire to protect Jenkin-Guerin from price competition when allegedly agreeing with Jenkin-Guerin to terminate plaintiffs, plaintiffs' only evidence is that Krause mentioned price when complaining to Lubrizol. This Court does not believe that this scant evidence is sufficient to withstand Lubrizol's motion for summary judgment. Plaintiffs must show that Lubrizol, as well as Jenkin-Guerin, was motivated by a desire to protect Jenkin-Guerin from price competition. *Alloy International Co.*, *supra* at 77,708 n.6. Plaintiffs simply have not controverted Lubrizol's cogent evidence to the contrary. Though there is sufficient evidence to allow the inference that Lubrizol terminated plaintiffs pursuant to an agreement with Jenkin-Guerin, evidence is totally lacking to support the inference that Lubrizol was motivated by a desire to protect Jenkin-Guerin from price competition. Even plaintiffs'

evidence of Krause's intentions and statements, which would have little relevance to Lubrizol's motivation, does not show that Krause was concerned with price competition. Krause's statements, as related by an ex-employee of Jenkin-Guerin, were only to the effect that he would force Lubrizol to terminate plaintiffs - no mention is made of his motivation.

Summary judgment will therefore be entered in Lubrizol's favor with respect to plaintiffs' Sherman Act claim. Plaintiffs' claim under the Missouri Anti-trust Act is deficient for the same reasons, see §416.141, R.S. Mo. (1974), and summary judgment will likewise be entered on that claim in Lubrizol's favor.

That leaves only plaintiffs' common law conspiracy count remaining against Lubrizol. This Court believes summary judgment in Lubrizol's favor is appropriate on this count also.² A civil conspiracy is a combination of two or more persons to do by concerted action an unlawful act, or to use unlawful means to do an act which is unlawful. *Rosen v. Alside, Inc.*, 248 S.W.2d 638 (Mo. 1952); *Rogers v. Poteet*, 199 S.W.2d 378 (Mo. banc 1947). The unlawful object of the conspiracy alleged by plaintiffs is the alleged violation of the federal and state anti-trust laws. Since this Court has granted Lubrizol's motion for summary judgment on the anti-trust claims, it necessarily follows that summary judgment is appropriate on the conspiracy claim. *Friedman Textile Co. v. Northland Shopping Center*, 321 S.W.2d 9, 17 (Mo. App. 1959).

John F. Nangle
United States District Judge

Dated: May 11, 1981.

² Lubrizol asserts that this claim is raised by plaintiffs under this Court's pendant jurisdiction and should be dismissed since the federal claims have been dismissed. See *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966). Since it appears that this Court has diversity jurisdiction over this claim, the merits of the claim will be discussed.